

UNITED STATES  
v.  
CRAIG ANDERSON

IBLA 84-393

Decided September 18, 1985

Appeal from a decision of Administrative Law Judge E. Kendall Clarke, declaring the Neva Mae #3 placer mining claim, CA MC 91878, null and void. Contest CA 12551.

Affirmed.

1. Evidence: Prima Facie Case -- Mining Claims: Contests

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

2. Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Mining Claims: Determination of Validity

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

APPEARANCES: James A. Miller, Esq., Oakland, California, for Craig Anderson; Wilbur W. Jennings, Esq., Regional Attorney, Office of General Counsel, U.S. Department of Agriculture, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig Anderson appeals from a February 28, 1984, decision of Administrative Law Judge E. Kendall Clarke declaring the Neva Mae #3 placer mining claim, CA MC 91878, null and void for lack of a discovery of a valuable mineral deposit. This claim is situated in the Trinity National Forest, California.

On May 26, 1982, the California State Office, Bureau of Land Management (BLM), at the request of and on behalf of the Forest Service (FS), U.S. Department of Agriculture, instituted contest CA 12551 through issuance of a complaint charging that a valid discovery was not disclosed within the

boundaries of the Neva Mae #3 placer mining claim and that the land embraced within the claim is nonmineral in character. Appellant denied the charges and a hearing was held before Judge Clarke on May 11, 1983.

At the onset of the hearing, there was confusion regarding ownership of the mining claim at issue. Craig Anderson, appearing on his own behalf, testified at the hearing that he was the sole owner of the Neva Mae #3. Documents provided show that Neva Mae #3 was located for gold on December 7, 1979, by Frank O. Reid and title to this claim, CA MC 62693, was transferred to Jerry Harris on August 6, 1980. However, the notice of assessment/intent to hold for 1980 was not timely received and, on June 30, 1981, BLM declared the claim abandoned pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). On July 9, 1981, Reid filed a new notice of location for Neva Mae #3 identical to the 1979 notice except for the July 9, 1981, date of location. 1/ Reid transferred his rights in this relocation, CA MC 91878, to Anderson through a quitclaim deed dated December 8, 1981, which was not recorded until April 27, 1983. 2/

The first Government witness at the hearing was Norman Day, a mineral examiner employed by FS. He participated in an examination of the land embraced by Neva Mae #3 on August 21, 1980, when Harris occupied the land under the original location. He testified that the claim is located on rough terrain through which Virgin Creek flows in a steep, narrow, and rocky gorge and that the claim contains relatively sparse amounts of stream gravel. Most of the placer material on the claim was found by Day to be in terraces, referred to as the high bar, 10 to 20 feet above the current channel of Virgin Creek (Tr. 24-26). He explained that three samples were taken at a point where Harris said his discovery point was located, which was in the high bar material above the stream. Two pan samples were immediately processed in Virgin Creek and in both cases no visible gold and very little black sand was produced (Tr. 51). A channel sample from the exposed workings, sample 30, was bagged and later processed in a Denver Gold Saver, a device for concentrating values from a placer sample (Tr. 51-55). Amalgamation of the concentrates resulted in recovery of less than 0.1 milligram of gold, having a value of 2.85 cents per cubic yard of placer material, based on \$ 500 per ounce of gold (Tr. 55-57; Exhs. G-15, G-16).

At the hearing, Day briefly discussed Harris' operation and possible alternative mining methods. He concluded that gold in the high-bar placer material could not be processed at less than \$ 9.80 per cubic yard of material (Tr. 58). He then expressed his opinion that, based on his examination and the test results, a reasonably prudent man would not be justified in expending his time and means with a reasonable prospect of developing a paying mine (Tr. 65).

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1/ Harris transferred his rights in the prior claim, CA MC 62693, to Orville Brown by quitclaim deed. Brown was served with a copy of the complaint, but declared his desire not to participate in the contest and disclaimed any interest in the claim.

2/ A third notice of location, recorded on Apr. 27, 1983, shows Anderson as the locator of Neva Mae #3 on July 9, 1981. It appears that this was an amended notice intended to reflect the transfer of rights in the claim from Reid to Anderson.

Robert Newman, mineral examiner employed by FS who was also present at the August 21, 1980, examination, appeared as the Government's second witness. He reaffirmed Day's account of the mineral examination of Neva Mae #3 and the test results (Tr. 94). He also added his opinion that, based upon the evidence, a person of ordinary prudence would not be justified in the expenditure of his labor and means with a reasonable prospect of developing a paying mine (Tr. 95).

Bertram M. Jones, a mining engineer and local miner, appeared as a witness for the contestee. He testified that on April 25 and 26, 1983, he examined the claim and processed 10 samples (Tr. 103, 105). Jones' samples were taken from two distinct areas. All except samples 5, 6, and 7 were taken from the high bar deposit (Tr. 111). Samples 5, 6, and 7 were streamside gravel deposits of a more transitory nature, being deposited and removed during periods of high water (Tr. 111-12). His sample 3 was obtained from the same area as the Government's sample 30 and his tests of this sample resulted in negligible signs of gold (Tr. 104, 106). Samples 1, 2, and 4 were from the same excavated trench as sample 3. Tests for sample 4 showed negligible signs, while results for samples 1 and 2 showed four colors each, for an estimated value of \$ 10 per cubic yard according to Jones' calculations. <sup>3/</sup> Samples 8, 9, and 10 were taken from other excavated areas of the high bar and showed four, two, and two colors, respectively (Tr. 103-08).

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<sup>3/</sup> Jones' usage of colors as a technical term is explained by reference to the following dialogue in the hearing transcript at pages 145-46:

"[Mr. Jones:] This is my tool; this is my visual. Now if you want to go out here in the river and pan gold and measure the particle size and weigh the gold, you can make up some things and you can begin to do this yourself, anyone can. It's just simply a matter of a lot of the gold, the fine gold that I worked with in this area, takes about 60 visible colors to make a grain.

"BY MR. JENNINGS:

"Q. If I'm wrong correct me. There is a variation in the size of colors?

"A. Very definitely. That interpretation is mine.

"Q. If the color was larger than a micron, as I recall you said, you would multiple [sic] it by a factor to --

"A. I wouldn't see it that small, but the factor is this: I'm saying there are 60 colors to the grain. In real fine gold, that might run -- if I were in an area where you didn't have gold that coarse, it was even finer, I said it might run 100 colors to the grain.

"Now what I'm saying is -- do you know the difference between a nugget and a flake and a spot and a color?

"Q. No.

"A. Well, then I can't explain it to you.

"THE JUDGE: This is an estimating tool from your experience.

"THE WITNESS: Right. This is my estimating tool.

"THE JUDGE: From your experience, 30 [sic] of those colors of a certain size equals one grain, and that's just an estimate.

"THE WITNESS: Yes, sir. A visual analysis, visual estimate."

Jones further explained, with respect to his examination of the gold on the claims: "It's fine gold. It's gold that it takes 60 of those little colors to make one grain, 1/480 of an ounce" (Tr. 108).

Jones also sampled a recent gravel deposit in the stream consisting of only two to three yards of material, sample 5, where he found 41 colors, for an estimated value of \$ 106 per cubic yard of material (Tr. 106-07; Exh. C-B). Jones acknowledged that sample 5 was not representative, noting that "It's high grade, relative, but it has no real volume and should not be averaged back in with these others that represent the old bar" (Tr. 107). Samples 6 and 7 were taken from a deposit of stream gravels resting between the stream and high bar. Testing of sample 6 resulted in negligible signs of gold while sample 7 showed 30 colors, for an estimated value of \$ 75 per cubic yard.

Jones estimated that the gravel deposit on the high bench contains approximately 3,000 yards of material (Tr. 106, 118). Jones offered his opinion that through a small scale operation a miner could be compensated for his effort but should not expect to make substantial returns on the investment (Tr. 112).

Based on the evidence presented at the hearing, Judge Clarke determined that the contestant, the Government, had satisfactorily presented a prima facie case that a discovery had not been made. He discussed the evidence presented by the contestee's expert witness and concluded that the best that can possibly be said of the claim is that there is a very small quantity, an isolated bit, of gravel containing some mineralization which can be mined in a very short time. The other samples, he said, were low in value even by Jones' estimates. Judge Clarke questioned Jones' sampling techniques, but held that even if Jones' estimates were correct he had not shown the existence of enough material to justify a reasonably prudent man to expend his time and means with a reasonable prospect of developing a paying mine. As noted above, Judge Clarke declared Neva Mae #3 null and void.

Appellant alleges several grounds for error in his statement of reasons for appeal. First, it is asserted that no prima facie case of invalidity was established. Because appellant's claim was located in 1981 and the mineral examination was made in 1980, appellant insists that no mineral examination was made of his claim and, hence, there is no prima facie case. Appellant contends there is no evidence that the property examined in 1980 is the same as his claim located in 1981. Further, appellant alleges error in that the Government mineral examiner failed to conduct a complete examination. Specifically, appellant challenges his failure to dig to bedrock where the values tend to be greater. Finally, appellant contends that he overcame any prima facie case presented and that the Administrative Law Judge erred in finding that a prudent man would not invest his labor and means with a reasonable prospect of success in developing a paying mine.

[1] In order to become entitled to a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists where the mineral found is of such quantity and quality that a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man" test has been refined to require a showing that the mineral disclosed is "presently marketable at a profit," which simply means that the mining claimant "must show that as a present fact, considering historic price and cost factors and assuming that they will

continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 19, 90 I.D. 352, 360 (1983).

Where the Government contests the validity of a claim, the Government bears the burden of presenting a prima facie case that the claim is invalid. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Dresselhaus, 81 IBLA 252 (1984). The claimant, however, as proponent of the rule that the claim is valid, bears the ultimate burden of proving entitlement under the mining laws, and, thus, must overcome the Government's showing by a preponderance of the evidence. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974).

The generally accepted rule is that a prima facie case has been presented in a mining contest where the record establishes that a qualified mineral examiner has examined the claims and found the mineral values insufficient to support a finding of discovery. United States v. Dresselhaus, *supra* at 257; United States v. Winters, 2 IBLA 329, 335-36, 78 I.D. 193, 195 (1971). Appellant initially challenges the existence of a prima facie case by complaining that the FS mineral examiners did not examine his claim because their field investigation preceded his location and the claim examined by them is physically different than his own claim.

Notwithstanding the protestations of appellant before this Board, the record leaves no doubt that the mineral samples taken and analyzed by the Government mineral examiners were taken from the land embraced within this claim. Appellant's mining expert testified that one of the high bar samples which he examined on appellant's behalf was located "very close to the same area that the Government's 150-pound bag sample [sample 30] was taken from" (Tr. 104). There was no objection at the hearing that the Government mineral examiner's sample points were not located on appellant's claim. Accordingly, we find that the FS mineral examiners examined the land in appellant's claim and that the mineral samples analyzed by the examiners were taken from the land in appellant's claim.

Regarding the sufficiency of the examination to support a prima facie case, it is well established that it is not the responsibility of a Government mineral examiner to do discovery work, to explore or sample beyond the exposed workings, or to undertake rehabilitation of discovery cuts in order to make a prima facie case. United States v. Dresselhaus, *supra*; United States v. Winters, *supra* at 335, 78 I.D. at 195. It is sufficient for establishing a prima facie case that the examiner testify that he has examined the claim or the claimant's purported discovery point and based on his expert judgment, the claim lacks sufficient signs of mineralization to indicate discovery of a valuable mineral deposit.

Day testified that he visually inspected the entire claim, found a general lack of placer material except for the high bar deposit, and sampled the portion of the geological material believed to contain the likely source of valuable minerals existing within the claim's boundaries. Anderson specifically challenges the Government's test results by complaining that the channel cut sample taken by the Government examiners stopped at the bottom of the exposed "discovery" cut only 4 inches from bedrock and failed to include the potentially mineral-rich material resting above bedrock. His allegation

that the sample method was "tainted" is unsupported by Jones' sample 3 taken in the same area. This sample, taken to bedrock, also indicated that the area tested contains little or no gold (Exh. C-C). Allegations by a claimant that the mineral examiner employed improper sampling procedures will be given little weight where the claimant introduces no probative evidence establishing that those samples failed to accurately represent the mineral value of the land. United States v. Murdock, 65 IBLA 239 (1982); see United States v. Winters, *supra* at 335, 78 I.D. at 95. Thus, we must affirm the holding of Judge Clarke that the Government established a prima facie case of the invalidity of appellant's mining claim.

[2] With the establishment of a prima facie case that the land lacks sufficient mineralization to support a valid claim, the burden shifted to claimant to produce evidence of a discovery. Anderson argues that the sampling performed by Jones was more representative of his discovery than the single sample recorded by the Government. He suggests that Judge Clarke's misapplication of the "prudent man" standard to Jones' samples and misinterpretation of the testimony resulted in an erroneous determination of the claim's mining potential.

Jones indeed extracted more samples of the claim's surface materials than the Government examiners. While Jones is qualified as a mining engineer, the methods he employed to test his samples and the conclusions he reached are not beyond scrutiny.

Jones used different methods to sample the claim. For each of samples 1 through 4 and 8 through 10, he placed every tenth shovelful of material from the test cut into a pile from which he then took a panful of material (Tr. 136-37). The contents of the pan were then divided into four portions; three-fourths were discarded and one-fourth was retained and processed (Tr. 134-43). Samples 6 and 7 were full pans of material obtained by Anderson and processed by Jones (Tr. 142). Sample 5 was a 2-cup grab sample which was entirely panned (Exh. C-C).

Jones acknowledged on cross-examination that the treatise by John Wells on placer examination <sup>4/</sup> is "accepted in the industry" (Tr. 123-24). Further, Jones recognized the statement by Wells to the effect that: "In typical gold placers, the variations are so great and the values are so low, any attempt to divide a sample by taking alternative shovels, mechanical splitting or other means will invariably yield erratic results." *Id.* at 97. Jones took every tenth shovelful for his samples and mechanically split the test pans of material.

Apart from the uncertainty concerning the representative nature of the samples obtained, Jones' method of valuation engenders uncertainties as to the reliability of his testimony. After Jones had panned the sample down to concentrates, he estimated the gold content through "visual assay" by grouping the "particles" or "colors" of visible gold into several size classifications and counting them (Tr. 107-08, 143-46). This visual assay "is based

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<sup>4/</sup> J. Wells, Placer Examination Principles and Practice (U.S. Department of the Interior, Bureau of Land Management, Technical Bulletin 4, 1973).

on gold fineness as far as particle size, it's based on the number of particles per level pan, and it's based a lot on experience" (Tr. 107). See n.3, supra. Wells, supra at 88, recognizes this procedure: "The experienced panner will fan out the concentrate on the bottom of the pan and by 'tailing' the gold he can inspect or count the colors. At this point he can estimate the tenor of the sample." However, this process merely enables the examiner to characterize the general nature of the sample material and it is only a preliminary step to removal of the gold, usually by amalgamation, to obtain a more precise determination of the mineral value. Jones himself characterized his "estimating tool" as "nothing more than a rough field check" and stated that his "interpretation" was not "100 percent right on these values" (Tr. 107, 146, 150). While he testified that he knew of others relying on this method, he could not verify its general acceptance by the professional mining community (Tr. 149-50). When queried on cross-examination regarding his failure to perform a more definitive check for the value of the gold in the samples, he replied, "I have no reason because its a very small amount" (Tr. 150).

Of greater significance in determining whether the Government's prima facie case has been rebutted is Jones' depiction of the volume of the different gravels and their relative values which contradict any reasonable expectation that gold can be "extracted, removed, and marketed at a profit." Jones' samples 1 through 4 and 8 through 10 represented the high bar placer deposit. The material in these samples ranged from negligible value to \$ 10 worth of gold per cubic yard according to Jones. However, Day provided un rebutted testimony that the least expensive feasible processing method would cost claimant \$ 9.80 per cubic yard of material (Tr. 58). Under these conditions, it would be unlikely that appellant could profitably mine the high bar material. Newman testified that if the value of this material was an average of that shown on Jones' high bar test samples, it was too low to support a profitable operation employing any mining method (Tr. 168). This evidence and testimony does not support a discovery under the prudent man test in the high bar material. Less than 2 yards of material exists for the high grade sample 5. This small, isolated bit of gravel would not justify expending effort, time, and capital to mine the entire claim and thus fails the prudent man test as a discovery.

After reviewing the evidence and testimony, we must conclude that appellant failed to rebut the Government's prima facie case that his placer mining claim, Neva Mae #3, is void for lack of discovery of a valuable mineral deposit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Clarke is affirmed.

C. Randall Grant, Jr.  
Administrative Judge

I concur:

James L. Burski  
Administrative Judge

## ADMINISTRATIVE JUDGE MULLEN CONCURRING IN THE RESULT:

I agree with the conclusion reached by the majority but, because of the nature of the evidence presented at the hearing, find myself compelled to comment.

First, as to the nature of a prima facie case, I wish to note that there are weak prima facie cases and there are strong ones. This is one of the weakest I have been called upon to review. The basis for this conclusion is the nature, time, and extent of the examination conducted.

On the positive side, two Government witnesses established that they had sufficient training and background to qualify as expert witnesses. They had examined the site of the claim, taken samples, assayed one of the three samples taken, and concluded, based upon their observations and findings, that there was not sufficient value for a prudent man to justify the expenditure of his time and means in the development of a mine. The sampling, assaying, and reporting regarding the one sample taken could be used as a textbook example of how it should be done, almost. Based upon these observations and findings the expert witnesses concluded that no discovery had been found on the site. This is sufficient to establish a prima facie case.

The record is far from problem free, however. These problems should be noted. The first, and most obvious, is the fact that, although five mineral examiners were on the site, only one sample was taken. The Government witnesses placed great weight on the Wells technical bulletin, quoting from it in rebuttal testimony. <sup>1/</sup> However, at page 28, Wells states "any one sample is rarely representative of the overall deposit and by itself may mean little." Further, Wells recognizes the importance of experience and insight, noting that mathematical formulae and general rules do not replace experience-based judgments. Id. at 29.

The second serious flaw in the Government case was the failure to go to bedrock when taking the sample. The nature and extent of this failure raises an obvious question regarding the impartiality of the expert witnesses and almost destroys the prima facie case. This failure can best be illustrated by quoting from the transcript.

When testifying as to the difficulty of taking the sample, Mineral Examiner Day gave the following testimony:

Q. Mr. Day, what did you mean when you put a check mark in the box hard digging?

A. I marked that it was not difficult to dig as being difficult compared to other types of gravels that were perhaps more compacted.

Q. What would conditions be if you did encounter a rock?

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<sup>1/</sup> John H. Wells, Placer Examination Principles and Practice, Technical Bulletin 4, U.S. Department of the Interior, Bureau of Land Management (1969).



A. You'd have to move the rock, but at least where we took our samples the gravels had clay in them but they were at least loose.

Q. Would the rocks cause you difficulty in processing?

A. Yes, yes.

Q. But not in the digging?

A. What we meant by hard digging was that it would have been in relationship to it being compacted gravel.

THE JUDGE: Or cemented gravel?

THE WITNESS: Or cemented gravel, correct.

(Tr. at 60). During cross-examination regarding the sample taken and assayed, Day gave the following testimony:

Q. On your samples up at the claim, did you go to bedrock at any time?

A. No. The placer sample no. 30 was -- the bottom of that sample was close to bedrock but it did not appear to be right on bedrock.

Q. Why didn't you go to bedrock?

A. Because the Claimant had not sufficiently cleaned the cut to allow sampling all the way to bedrock.

Q. Isn't it true, though, that most of the fine gold is found down at bedrock?

A. Not necessarily fine gold but it is true in a lot of cases gold is concentrated on bedrock in most placer deposits.

Q. But you didn't go to bedrock?

A. We were not able to because the Claimant had not properly cleaned the sample points to bedrock.

Q. That's up to the Claimant.

A. That's correct.

Q. You mean Jerry Harris?

A. That's correct.

(Tr. 67-68). When discussing a photograph of the sample site, Day testified:

Would you refer to Government's 13 and describe what's seen there?

A. This is a photograph of the channel sample after it was taken, after sample no. 30 was taken. We got as close to bedrock as we could without doing any of the excavation that the Claimant should have been doing to remove all the slough material from the sample site. We were probably within a few inches of bedrock.

(Tr. 47). When discussing the purpose for making the examination, Mineral Examiner Newman testified:

Q. You're employed by the Federal Government and you're told to go in and take a validity test of a mining claim which is in jeopardy.

I just want to know your true gut feeling of your attitude as far as pursuing a diligent sample of gold?

A. Okay. I've always tried to maintain professional ethics in the work I do and so when I go into any mineral exam, whether it be here in California or in Alaska or Montana, I try to go into it as impartial as possible and do a diligent job of examining any claims that I'm requested to examine.

Q. Even though you stopped four inches from bedrock?

A. I have certain standards by which I am allowed to perform a mineral examination and one is not making a discovery for a Claimant or digging his discovery pits or cleaning them out for him.

Q. But as a professional person you know that most of the gold is down at the bedrock?

A. In some deposits, yes.

(Tr. at 89). The importance of going to bedrock when taking samples is discussed in Wells technical bulletin at pages 7 and 8.

There is no question that a mineral examiner need not do the exploration for the claimant or excavate openings in order to take samples. However this holding by this Board must be tempered by reason and good common sense. A close examination of a few of the cases where this Board has so held will illustrate the intent. In United States v. Lyle O. Cook, 71 IBLA 268 (1983), claimants alleged their discovery point was at the bottom of a deep hole in an active river beneath many large boulders. In United States v. J. L. Noss, 54 IBLA 355 (1981), the claimants failed to keep their discovery points on underground lode mining claims open and safely available for examination. In United States v. Clare Williamson, 45 IBLA 264, 87 I.D. 34 (1980), the discovery point was caved and inaccessible. In United States v. Knecht, 39 IBLA 8 (1979), the claimant repeatedly refused to allow Government mineral examiners to take any samples on the claim, thus completely denying access. In United States v. Alex Bechthold, 25 IBLA 77 (1976), the

old underground workings were unsafe and not in any condition to be examined. In United States v. Lem A. & Elizabeth D. Houston, 66 I.D. 161 (1959), tunnels were filled with water or caved in to such an extent as to make them impassable. In the present case the five mineral examiners used the precedence established by the above cited and similar cases as a basis for their refusal to dig 4 to 6 inches deeper (less than the length of a shovel blade) in an open and dry cut even though, by their own testimony, the material was not difficult to dig.

Notwithstanding this serious flaw in the procedures used when sampling, the error does not go to the admissibility of the evidence. Rather, it has bearing upon the weight to be given to evidence presented and, thus, the evidence required to overcome the prima facie case.

The third flaw in the Government case was the timing of the sampling. Appellant argues at some length that the claim examined was not the claim owned by appellant. Following a failure to file necessary notice of intent to hold or affidavit of annual assessment work the claim was declared null and void. It was subsequently relocated by appellant. However, there is absolutely no question that the point sampled, on the earlier claim was located both on the earlier and subsequent claim. While the claim changed, the land it embraced did not. The findings and conclusions reached at the hearing would be overcome by a subsequent discovery anywhere on the new claim, but lacking one the results remain unchanged. <sup>2/</sup>

Bertram M. Jones testified for appellant. This witness also had sufficient training, background, and experience to qualify as an expert. In his examination of the property this witness examined ten samples from the claim, and estimated mineral value based upon physical observations during panning, commonly referred to as counting colors. <sup>3/</sup> However, his sampling technique was also flawed. First, the samples taken were split prior to panning. Wells discusses at some length the fact that, for placer gold, split samples tend to be erratic and unreliable. See Wells, supra, at 97-99. Second, while a valid sampling technique, the method used for determining the value of contained gold is, using his own words "nothing more than a rough field check." Tr. at 150. Third, the two highest samples were admittedly not representative of the gravels being examined as the total estimated volume of the "reserves" represented by these two samples was 13 yards, three samples were nil, and thus, only five samples disclosed mineralization which could be considered in the evaluation.

Three of the samples taken by Jones were taken in close proximity to that taken and assayed by the Government mineral examiners. Sample 3 was taken very close to the same area that the Government's 150-pound sample was taken and no visible colors were found. This tends to confirm the Government

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<sup>2/</sup> For example, had appellants been able to identify another discovery point which contained sufficient mineralization, the evidence regarding the new discovery point would have been sufficient to overcome the Government case.

<sup>3/</sup> See, e.g., discussion of physical observation in Wells, supra at 28 and 88; Jackson and Knuebel, Sampling and Estimation of Ore Deposits, U.S. Dept. of Commerce Bulletin 356 (1932), at 2.

sample. Sample 2 was taken at bedrock in the same area. Jones estimated the contained gold to be \$ 10 per yard. For illustration only, a combined value of the Government sample which did not go to bedrock and Jones' sample which was only at bedrock would result in an approximate value of \$ 1.45 per yard (.5' x \$ 10 + 3' x \$ 02.85/3.5' = \$ 1.45).

I turn now to the basis for my concurrence with the results. The witnesses for the Government testified that the estimated cost of mining was approximately \$ 9.80 per ton. Jones found that the claim was not highly mineralized, but that there are sufficient values to warrant holding the claim for a small operation where only small capital is required and the mining is done on a casual basis. He estimated that 3,333 yards of ore on the claim contained \$ 15,865 in recoverable values at \$ 480 gold prices (\$ 4.76 per yard) (Exh. C-C). When testifying as to the value of the deposit Jones stated:

Q. Now, do you have an opinion if a prudent man would be justified in investing his time and money to develop a paying mine?

A. If you want a place that's back there and you want to have something that you can put your effort into and get your money back and a little bit more and not get real wealthy, you have an ideal claim and an ideal situation.

If you think you're going to go in there and make \$ 20,000 or \$ 30,000 or \$ 40,000 a year, you're mistaken. You can't do it; it's physically impossible.

But I do believe that on a small scale with something like a three-horsepower or a five-horsepower pump, bringing the water up into those old cuts and putting that material by hand into [a] sluice box and taking the black sand mat product and grinding, if necessary grinding it into metal pan with a brick in it with some ammonium hydroxide before amalgamation so that you can trap those fine -- that fine gold, not just get the pieces you can pick out of there with a tweezers because those aren't going to support you. You're going to have to get the fines along with it.

If you build enough box and put a small enough slope on it and get enough water up there to match where -- you're matching the water in the box and the right kind of riffle mat, there's no reason why you couldn't, if you had to, didn't have a job, you couldn't go in there and support yourself.

There's no reason why you couldn't do that.

(Tr. 112, 113). Following Jones' testimony, Government mineral examiner Newman once again testified. In the course of his testimony, he was asked to examine the Jones report (Exh. C-C) and gave the following testimony in response to questions by Judge Clarke:

I'm much more interested, Mr. Newman, in your evaluation of the samples that I see on page 3. If we were to first of all, just for purposes of argument, to assume that the values shown

here, the dollar value is somewhat accurate, and we throw out sample 5 as coming from an area which hasn't got any volume and 6 and 7 from areas that have very low volume so that we're really talking about the other samples.

What kind of analysis do you make, assuming that those are accurate samples, just for argument purposes, that the samples that represent the area from that high bar which is apparently the area that you would agree there's a volume of material that could be worked.

THE WITNESS: I'm not sure what you're asking me to do.

THE JUDGE: I'm asking you to look at those samples disregarding 5, 6 and 7 and now assume that the values [sic] shown is an accurate value of those pans that were taken.

THE WITNESS: You're asking me to look at the dollar values?

THE JUDGE: I'm asking you to look at the dollar values. Assume that they were properly taken. What kind of analysis from your professional standpoint do you make, if in fact those samples are accurate as far as the value of this claim?

THE WITNESS: Do you want me to go into that analysis or just state it in summary form?

THE JUDGE: Yes. I would like to hear what you think about it.

THE WITNESS: The first thing I would do if I could agree with all of the assumptions you've asked me to make is that you could perhaps take an arithmetic mean of samples 1 through 4 and get maybe a value of \$ 5 a yard. You may be able to take an arithmetic mean of samples 8, 9 and 10 and get an arithmetic mean of \$ 7 and some cents. I'm not sure about the location of the samples on the ground, whether that would be a proper grouping.

THE JUDGE: Let's assume that they are where they're shown on Exhibit B. Assume that those samples are in the area where Mr. Jones shows they are.

THE WITNESS: Okay.

(Short pause.)

THE WITNESS: I guess I would have no reason to take arithmetic means of two groups. I suppose I would simply take an arithmetic mean of the seven of them. It would be 40 divided by seven, so it would be in the neighbor [sic] of \$ 6. I could calculate that precisely if you wish me to.

THE JUDGE: No. But it's around \$ 6.

THE WITNESS: Yes, sir.

THE JUDGE: What now does it tell you about this claim? Assuming that all this is correct and that these are accurate kind [sic] of samples and that this is what you had gotten. What can you tell me about this claim?

THE WITNESS: Tells me that the values there are still too low to be operated profitably by any mining method that I would think appropriate for that deposit.

THE JUDGE: Okay. Do you have some more questions, Mr. Jennings?

MR. JENNINGS: No.

THE JUDGE: Do you have some questions, Mr. Anderson?

MR. ANDERSON: No.

THE JUDGE: You're excused.

(Tr. 166-69). This evidence was not refuted by the claimant, either on cross-examination or by presentation of additional evidence on his own behalf. It is, therefore, uncontested. Therefore, the evidence as a whole, supports a finding that there has been no discovery on the claim.

R. W. Mullen  
Administrative Judge

